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Supreme Court of the United States

October Term—1926

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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Subject Index

PAGE

Statement of the case and the questions involved ... 1

The Trustee's reliance upon a contention unsupported by the record and contrary to the uncontradicted evidence ... 3

The *Modus Operandi* of the Drawing Service ... 6

Terms and conditions of the Drawing Service ... 7

Facts ... 9

Brief of the Argument ... 18

POINT I.

Pursuant to the terms of the Drawing Service, the bankrupts caused Banca Commerciale Italiana to create, out of the bankrupts' funds on deposit with Banca Commerciale Italiana, a fund for the payment of the draft involved in this proceeding. Thereby an equitable assignment of the moneys was effected ... 19

POINT II.

Moneys remitted to the bankrupts in connection with the drawing of a draft under the terms and provisions of the bankrupts' Drawing Service were received by the bankrupts as agents of the remitter for the purpose of applying the same to the payment of the draft ... 36

POINT III.

The petition for a Writ of Certiorari should be denied ... 50

Table of Authorities

	PAGE
American & English Encyclopedia of Law, Sec. Ed., Vol. 19, p. 16	28
Burdett v. Willett, 2 Vernon, 638	40
Burns v. Carvalho, 4 W. & C. 890	24
City of St. Louis v. Johnson, 5 Dillon 241	40
Coates v. First National Bank of Emporia, 91 N. Y. 20	21
Corpus Juris, Vol. 8, pages 83-372-831-1004	32
Cutler v. Am. Ex. Natl. Bank, 113 N. Y. 593	32, 40
Equitable Trust Co. v. Keene, 232 N. Y. 290, 295	44
Farley v. Turner, 26 L. J. Ch. 710	38
Fortier v. Delgado & Co., 122 Fed. 604	21
Fourth St. National Bank v. Yardley, 165 U. S. 634	21
Giles v. Perkins, 9 East. 12	40
Hackett v. Campbell, 10 App. Div. (N. Y.) 523	21
In re A. Bolognesi & Co., 254 Fed. Rep. 770	40
In re Jarmulowsky, 258 Fed. Rep. 231	40
Kingman v. Hotaling, 25 Wend. 423	32
Massey v. Fisher, 62 Fed. Rep. 958	40
Moreland v. Brown, 86 Fed. Rep. 257	40
Muller v. Kling, 209 N. Y. 239	21
Peak v. Ellicott, 30 Kansas 156, 1 Pac. Rep. 499	40
People v. City Bank of Rochester, 96 N. Y. 32	40
People ex rel Zotti v. Flynn, 135 App. Div. 276	40
Risley v. Phoenix Bank, 83 N. Y. 318	21
Rivers v. A. & C. Wright Co., 43 Southeastern 499	21
Roca v. Byrne, 145 N. Y. 182	40
Ryan v. Phillips, 3 Kans. App. 768 44 Pac. Rep. 909	40
Star Cutter Co. v. Smith, 37 Ill. App. 212	40
Throop Grain Cleaner v. Smith, 110 N. Y. 83	21

Official Report of the Opinion Delivered in the Court Below

In re Gubelman, et al., ex parte First National Bank of Trinidad, 13 Fed. Rep. (2nd Series) 732.

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October Term—1926.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

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THE FIRST NATIONAL BANK OF TRINIDAD, COLORADO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

(Italics Ours)

Statement of the Case.

Knauth, Nachod & Kuhne, a partnership, was petitioned in Bankruptcy in the Southern District of New York on June 15, 1923, and thereafter, in due course, a Trustee in Bankruptcy was elected.

Up to the time of the Bankruptcy, Knauth, Nachod & Kuhne (which for convenience will hereafter be referred to as K., N. & K.) were Commercial Bankers. In the course of their business they conducted, for profit, what was known as a "Drawing Service," the operation of which will be described presently, and solicited inland

banks to deal with them under it. The claimant availed itself of the "Drawing Service" and, in accordance with the terms thereof, sold to its customer its draft on K., N. & K.'s Italian correspondent, Banca Commerciale Italiana (hereinafter called B. C. I.) at Sassari, Italy, and thereupon forwarded certain monies to K., N. & K. K., N. & K. thereupon had certain transactions with B. C. I., its correspondent, and out of these circumstances two questions were presented by the claimant's reclamation petition. Tersely stated these questions are:

(1) Did the Bankrupts receive claimant's remittance as claimant's agents, to apply the same to a particular purpose?

(2) Independently of (1), was there an equitable assignment by the Bankrupts of certain monies, on deposit by them with B. C. I., for the payment of the draft involved in this proceeding?

The learned Special Master, to whom the petition was referred, decided both questions in the negative. Upon the Trustee's motion, the Special Master's report was confirmed in the District Court, with an opinion in which the learned Judge said (fol. 669):

> "The law finally to be applied to the subject matter of this controversy between claimant and Trustee in Bankruptcy of K. N. & K. will be declared by the Appellate Court and my views concerning the same are of fleeting importance * * *."

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit, the order of the District Court was reversed and the reclamation claim allowed,

the Circuit Court of Appeals finding that there had been an equitable assignment for claimant's benefit and finding it unnecessary to pass upon the question whether the monies were originally transmitted to the Bankrupts for a particular purpose (fol. 769). The opinion of the Circuit Court of Appeals is reported in 13 Fed. (2nd Series) page 732.

The Trustee in Bankruptcy contends that the conclusion of the Circuit Court of Appeals was erroneous. His claim is summarized in his statement of "The Contentions of Petitioner-Trustee" (Petition, pp. 4-5) and appears to be predicated solely upon the claim that there could not have been an equitable assignment, "because they (K., N. & K.) retained control of the amount so credited"—referring to the monies which the Circuit Court held had been equitably assigned.

It is a singular circumstance and, considering the emphasis which was placed upon the fact in the Courts below, an omission which cannot be attributed to inadvertence alone, that the Trustee persists in ignoring, if not suppressing, in his statement of the facts and his quotations from the testimony, the uncontradicted testimony of his own witnesses, that the Bankrupts did NOT *retain* [redacted] *the control which counsel asserts as the basis for his argument.*

This alleged control is the foundation of the Trustee's contention. There is no dispute in the testimony about the fact that no such control existed, and only the weakness of the Trustee's position can explain this attempt to create an impression unsupported by the Record and contrary to the uncontradicted testimony of his own witnesses.

It may reduce the labor of the Court if we dispose of this question at the outset, and we shall, therefore, though it be at a risk of sacrificing logical sequence, direct the Court's attention to the evidence which will dispel any doubt that may remain upon the subject.

Mr. Dawson, the Trustee's expert on international banking, was asked (fol. 350):

> "Is there * * * a general practice or custom with respect to the cancellation of advices after their receipt by a foreign bank and prior to the presentation of a draft for payment."

He was very cautious in his answer. First he asked to have the question repeated; after he heard it the second time he answered (fol. 351): "There is a custom." He was then asked:

> "What is that custom?"

and he replied (fol. 351):

> "*I take it the question means when the drawer bank wants to cancel a draft that has already been drawn and advised,*"

and Mr. Goldmark, the learned counsel for the Trustee, who was examining, said (fol. 352):

> "Precisely."

Thus it appears that the question put to Dawson, as limited by him with the concurrence of counsel, was:

> "Is there a general practice or custom with respect to the cancellation of advices after their receipt by a foreign bank and prior to the presentation of a draft for payment *where the drawer bank wants to cancel a draft that has already been advised?*"

The Court will observe that this was not such a case. *The drawer bank here was the claimant—not K., N. & K.* It is conceded that the claimant did not want to cancel the draft it had drawn and which K., N. & K. had advised abroad. Consequently, the testimony of Dawson that in cases where

> "the drawer bank wants to cancel a draft that has already been drawn and advised"

K., N. & K. would have the right to send notice of cancellation to the foreign bank, and the foreign bank would recognize such notices, has absolutely nothing to do with this case. Dawson was very careful to limit his statement of the custom so that it did not apply to the facts of this case. Yet it is this answer by Dawson (fol. 352), *and this answer alone*, upon which the Trustee builds his argument that the Bankrupts retained control of the fund in the hands of B. C. I. and that there could not, therefore, have been an equitable assignment. Obviously, the foundation does not exist and the argument is baseless.

K., N. & K. also recognized that it was authorized to cancel drafts previously advised *only in cases where the drawer bank requested it to do so.* This appears from the fact that it is undisputed that K., N. & K. never attempted to exercise such a right *except in cases where they had first been advised by the drawer bank that the draft had been lost or would not be presented to the drawee bank for payment* (fols. 282-284).

We believe the foregoing discussion of Dawson's testimony, even though it be slightly out of its logical order, may facilitate the disposition of this matter by the Court by disposing at the outset of the baseless state-

ments, iterated and reiterated in petitioner's brief, that K., N. & K. retained control over moneys taken from its account and credited to the "Drafts Payable" account. We now proceed to a more detailed statement of the facts and a discussion of the law applicable thereto.

The Modus Operandi of the Drawing Service.

The bankrupts supplied their inland correspondents (of which claimant was one) with a list of their foreign correspondents (Claimant's Exhibit "1," fols. 418-473) and a printed book of "Foreign Drafts" (Claimant's Exhibit "2," fols. 473-480). Each page in the book of "Foreign Drafts" contained two forms, the upper a blank draft (fol. 478), and the lower, an "Advice." The pages were perforated, so that these forms could be detached from the book and also separated from each other. When a customer of an inland bank sought a draft payable abroad, the bank would consult the "rate card" issued by the Bankrupts, on which the Bankrupts stated the rates at which they would "protect" drafts drawn that day on their various foreign correspondents. Thereupon, in return for an amount fixed on the basis of such rate, the inland bank, using one of the forms in the book of "Foreign Drafts," would issue to its customer *its own draft* on one of the correspondents listed by Bankrupts in their "Drawing Service." The bank would then fill out an "Advice" contained in the book of "Foreign Drafts," detach it from the book and immediately mail it to the Bankrupts with sufficient funds, computed at the rate fixed by the Bankrupts in their Rate Card for the drawing of the draft on that day.

Terms and Conditions of Drawing Service.

In the "Drawing Service" we find the following provision under the title "Terms and Conditions Governing the Use of K., N. & K. Drawing Service (fols. 422-423):

> "Upon receipt of advice by draft, accompanied by adequate funds payable at par in New York, we shall promptly forward our advice of the same and provide the drawee with funds sufficient for the payment of the draft abroad, by a transfer of credit from our balance, or otherwise, provided the draft is drawn on a bank named in our latest list of correspondents.
>
> *Under this arrangement, our correspondents in this country act as principals, and issue drafts in their own names, our name not appearing thereon. In other words, we are employed merely as the* AGENTS *of the drawers for the purpose of advising the issue of their drafts and providing the drawee banks with sufficient funds to cover their payment.*"

On the cover of the book of "Foreign Drafts," the relationship of principal and agent is again emphasized (fols. 474-475):

> "Upon receipt of advice of draft accompanied by adequate funds payable at par in New York, we shall promptly forward our advice of same, and make provision for its payment abroad, provided it is drawn on a bank named in our latest list of correspondents.
>
> *Under this arrangement our correspondents draw drafts for their own account as principals and our name does not appear,* OUR SOLE FUNCTION BEING TO ADVISE THE DRAWEES OF THE ISSUE OF DRAFTS

DRAWN BY OUR CORRESPONDENTS AND TO PROVIDE FOR PAYMENT, IN WHICH FUNCTION WE ACT AS AGENTS OF THE DRAWERS."

To make assurance doubly sure and to estop the inland bank from ever contending that the money had been sent to K., N. & K. in any capacity other than as agent to transfer it abroad, we find K., N. & K. printing into the stub, which would remain with the inland bank as the "Issuing Bank's Record" of the transaction, the words (fol. 480) "Paid K., N. & K. * * * (*Transfer Agents*)".

We must bear in mind that the language of the Drawing Service was chosen by the Bankrupts and that at the time they drew the Drawing Service they were contracting upon the theory they would continue in business and they were protecting themselves accordingly. They wanted no doubt or misunderstanding about the fact that for the negligible fee they received in connection with drafts drawn under the Drawing Service they were not guarantors of the continued solvency of every one of the thousands of banks throughout Europe upon which drafts might be drawn. They undertook to provide a fund abroad and they wanted it perfectly clear that once they did that their obligation was met and their liability ended. If thereafter the foreign bank should become insolvent, or for some other reason fail to honor the draft, K., N. & K. did not propose to answer for such defaults. It would be difficult to choose language better adapted to their purpose. They state and reiterate throughout the Drawing Service that they are employed merely as the "*agents*" of the drawers for the purpose of advising the issue of their drafts and providing the drawee bank with sufficient

funds to cover their payment, and to dispel the last shred of doubt they create an estoppel by making the inland bank's own record of the transaction show that it sent the money to K., N. & K. as "*transfer agents.*"

The draft and the "Advice" involved in this proceeding are Claimant's Exhibits "3" and "4" (fols. 481-483). The draft was for 24,360 Lire, drawn by Claimant on Banca Commerciale Italiana, Sassari, Italy, in favor of Zara Sanna Giovanni.

The "Advice" mailed by Claimant to Bankrupts immediately upon the sale of the said draft reads (fols. 482 483):

> "Pursuant to the terms and conditions governing your drawing service we have sold draft, bearing the above number, dated Trinidad, Colo., May 19, 1923.
>
> For Lit. 24,360.00 and shall thank you to protect same upon presentation.
>
> We remit herewith the sum of 1,191.20 at rate 4 89 quoted on Rate Card No. 18."

Claimant's check for $1,191.21, which accompanied the "Advice," was received by the Bankrupts and deposited by them in their bank account. The draft was duly presented for payment but dishonored. The failure to pay the draft was not based upon any direction by Bankrupts to the foreign bank nor was it based on any failure on their part to actually create the fund with which to pay the draft. *They did create this fund and they made no attempt to destroy it or withdraw it. It remained with the foreign bank until the Receiver, long after bankruptcy but before the draft was presented, procured it to be sent to him.*

Immediately upon receipt of the claimant's "Advice" and the check to cover, the Bankrupts notified the Italian Bank of the drawing of the claimant's draft and directed the bank to "honor" it, "charging the same to our account," and in another communication, sent at the same time, directed the foreign bank to charge the said draft "to the debit of our account" (Claimant's Exhibit 6 and 6B; 6B being a recapitulation sent to the principal office of the B. C. I. of the drafts advised to its several branches, and 6D being the advice to the Sassari branch of the B. C. I. covering the draft involved in this proceeding. The court will note that the total of 6D, drafts drawn on the Sassari Branch, is included as one of the items on the recapitulation, Exhibit 6).

It is stipulated that the foregoing papers were received by B. C. I. on or before June 4, 1923 (fol. 76). They are known as Steamer Block "SS 8469-B." It is stipulated that there was a regular course of dealing between the B. C. I. and the Bankrupts, by which the B. C. I. sent to the Bankrupts, approximately each week, statements of the Bankrupts' account with the B. C. I. (fol. 78); that on these statements the B. C. I. showed that it had debited the Bankrupts' account with the amounts of drafts advised and that this practice of immediately debiting the Bankrupts' account with these amounts was recognized as proper by the Bankrupts (fols. 81, 82). Claimant's Exhibit 8 is one of these statements of account, from which it appears that on June 4, 1923, the bank abroad debited Bankrupts' account with the total of Steamer Block "SS 8469-B," which included claimant's draft, and that it reported to the Bankrupts that it carried forward for their account a specified balance, *which*

remained after deducting from their former balance various sums, including the amount of Steamer Block "SS 8469-B." Claimant's Exhibit 9, which is another of these statements, carrying the account up to and including the date of bankruptcy, shows that at no time up to and including this date did the bank abroad recredit to the Bankrupts any of the moneys which had been charged out of their account to cover Steamer Block "SS 8469-B."

Not only do the stipulated facts show that the money was taken *out of the Bankrupts' account*, but they go further and show that these moneys, upon being taken out of the Bankrupts' account, were *credited to an account maintained by the B. C. I. entitled "Drafts Payable,"*

> "in which account were also credited amounts of drafts advised to the said B. C. I. for payment by other depositors or clients of the B. C. I. in addition to the bankrupts" (fols. 89, 90).

No better statement of the nature and the purpose of the account to which these moneys were credited by the foreign bank could be made than that of the Trustee's witness, Mr. Dawson, Vice-President of the Guaranty Trust Company (fols. 339-340). Mr. Dawson said that he was familiar with the practices and usages in connection with the protection of drafts by New York bankers on behalf of inland banks (fols. 345-346); that there was a "universal custom" in this regard (fol. 348) pursuant to which

> "the drawee bank, upon receipt of advice from its client that a draft has been drawn on it, immediately charges the current account of that client with the amount of any draft or drafts and *sets it aside in a special fund awaiting the presentation of any drafts against that fund.*"

At folios 356-357 Mr. Dawson said that originally the drawee banker, upon receiving notice that a draft had been drawn on him,

> "*held the money in his box or in his office, useless, awaiting the presentation of the commitment or draft.*"

and (fol. 372)

> "probably earmarked each particular bag for a particular purpose";

further, that this practice (fol. 357)

> "has hung on in modern times • • • "

except that now the foreign bank accomplishes (fol. 365)

> "*exactly the same result*"

by making appropriate book entries, or, to put it another way (fol. 370):

> "We still keep the money in the box, but not specifically. We look over our active liabilities which are imminent, and readjust our cash position in general, but not specifically."

The Trustee shies perceptibly at this testimony of his own witness and seeks to minimize it by describing it as merely Mr. Dawson's "belief." It is characterized by the Trustee as fallacious because, says the Trustee,

> "The bankers in early days who are said to have set aside cash to meet advised drafts were not setting aside cash which belonged to their depositors, but *their own cash*, so that *they* would be in the 'possession of funds to meet their commitments.'" (Trustee's brief, p. 37; italics by Trustee).

We are unable to find any basis in the record for suspecting that the money which the banker set aside in the "early days" came from any source different from the money which the banker now sets aside. Of course, the banker "in early days" did not keep all of his deposits in cash. Neither does a banker today. The deposits were then converted into investments just as they are today. They are the property of the banker and he is merely a debtor of his depositor. The same was true "in early days." The point Mr. Dawson made was that in the early days, as soon as the foreign banker received notification that a draft had been drawn on him, the banker would "liquidate his investments" sufficiently to put himself in funds to meet the draft; put the money for each draft into a separate bag and (fol. 372) "probably earmarked each bag for a particular purpose" and "held (them) * * * in his box or in his office, useless, awaiting the presentation of the commitment or draft," and that "exactly the same result" is accomplished today by debiting the depositor and crediting "Drafts Payable," which is the banker's present name for "his box." Nowadays (fol. 356) with the existence of "banks of rediscount or methods of suddenly raising cash" it is not necessary actually to "liquidate" the investments but the same result is accomplished (fol. 365) by "book entries," or to put it in another way (fol. 370)

> "We still keep the money in the box, but not specifically. We look over our active liabilities which are imminent, and readjust our cash position in general, but not specifically."

Here is also a clear recognition that upon the receipt of an advice and the crediting of "Drafts Payable" the liability becomes "our liability," that is, *the liability of*

the drawee bank. That K., N. & K. clearly recognized this is corroborated by the fact that once K., N. & K. advised a draft abroad, they were not interested in whether the same was ever presented—it was no longer any concern of theirs (fol. 433).

The stipulated facts show further that although the Bankrupts were entitled to and did receive interest on their balance with the B. C. I., they recognized that they were not entitled to receive and did not receive interest on moneys deducted from their account and credited to the "Drafts Payable" account as a result of their advices of drafts drawn (fol. 92). The Trustee argues that the reason the foreign bank did not pay interest upon the moneys taken out of a depositor's account and put into the "Drafts Payable" account is that the use of the money

> "constituted the bank's compensation for its service in meeting the draft" (Brief, p. 33).

This statement is based upon the testimony of Dawson (fol. 357), that the original practice of the foreign banker of holding the money in his box, awaiting presentation of the commitment

> "has hung on in modern times like a great many other practices and has been availed of as a means frequently of compensating a banker for an account that would otherwise be troublesome and a loss. You have many accounts frequently that are active, which on bare balances in current accounts, are a lot of trouble and a loss in handling that would not be worth while and there is always a non interest bearing float that compensates you for the trouble you take."

This testimony of Dawson cannot be interpreted as suggesting that the *reason* for taking the money out of K., N. & K.'s account and putting it into the "Drafts Payable" account was that thereby it ceased drawing interest and thus indirectly provided "compensation" to the foreign bank for "the trouble" it took. It may very well be that the foreign bank, in determining whether or not it would handle this class of business, took into account the fact that it would result in providing the bank with funds free of interest charges, and that the foreign bank concluded that this circumstance made this class of business profitable. This, however, has nothing to do with the question whether, when the money was taken out of K., N. & K.'s account and put in the "Drafts Payable" account as "A special fund awaiting the presentation of any drafts drawn against that fund," there was, or was not, an equitable assignment. The question is not what considerations prompted the foreign bank to take on the business, but what the foreign bank did after it took on the business.

The stipulated facts show that while the fund was set apart and held by the bank abroad for the purpose of meeting the claimant's draft, the receiver cabled the bank abroad (Claimant's Exhibit 10) that "all credit balances in favor of Knauth, Nachod & Kuhne, New York, must be held subject to my sole order."

It is interesting to note the response which this cablegram elicited from B. C. I. (Claimant's Exhibit 11). They enclosed the statement (Claimant's Exhibit 9), showing the state of the Bankrupt's account up to the date of bankruptcy. This statement shows that the amount of Steamer Block "SS 8469-B" had been

charged out of the Bankrupts' account and had been credited to Drafts Payable on the books of B. C. I. *and that B. C. I. was indebted to the Bankrupts only in the sum which remained after deducting from the former credit balance of the Bankrupts, the amount of Steamer Block "SS 8469-B" and certain other Steamer Blocks advised by the Bankrupts.*

The next significant thing in Claimant's Exhibit 11 is B. C. I.'s notification to the Receiver that certain Steamer Blocks which had been advised by Bankrupts were (fols. 528-529)

> "being held in abeyance, not having been debited to the account *through lack of funds.*"

This establishes that even as between the parties themselves the charging of Bankrupts' account and the crediting of "Drafts Payable" were not mere "book entries," as the Trustee contends, *but were intended to record actual transfers of funds from one account to another.* On no other theory can the refusal of the B. C. I. to make the book entries on account of "lack of funds" be explained.

On June 29, 1923, the receiver wrote B. C. I. (Claimant's Exhibit 14) requesting it to

> "rule off the account" of Knauth, Nachod & Kuhne on June 16, 1923, and to forward to him by return mail "a statement of their account up to that date, *as well as* a list of all unexecuted cable transfers and unpaid drafts and money orders • • • ."

which again indicates that in the mind of the Receiver, when he sent this letter, "a statement of the bankrupt's account" on June 16, 1923, would *not* include moneys

which had been set aside by B. C. I. to meet drafts theretofore advised to it by Bankrupts.

On August 23, 1923, the receiver cabled B. C. I. (Claimant's Ex. 18) to

> "*cancel all drafts* charged but not paid before receivership and remit balance for (our) my credit to Central Union Trust Co., New York."

On September 10, 1923, B. C. I. wrote the receiver another important letter (Claimant's Exhibit 19).

In the first place it confirmed a letter sent to the receiver on September 8, 1923, which the Trustee has not produced.

In the second place it gave a resume of certain enclosures (Claimant's Exhibits 19A and 19B) showing the condition of the Bankrupt's account and explaining how the fund returned to the Receiver was made up.

Claimant's Exhibit 19B, one of the enclosures in Exhibit 19, was a statement showing a balance in the Bankrupt's favor of 1,629,770 lira. This statement and the letter in which it was enclosed show that in arriving at this balance B. C. I. had accepted the Receiver's direction to "cancel all drafts charged but not paid before receivership" and had thereupon recredited to the account of the Bankrupts the sum of 1,526,048.48 lira, *which sum represented certain specified amounts theretofore taken out of the Bankrupt's account and credited to Drafts Payable to meet drafts advised, when presented.* A detailed statement of the drafts, the amounts of which were so recredited, was also enclosed in this letter and is Claimant's Exhibit 19A. A reference to Exhibit 19A (fol. 560), shows that among these drafts *is draft 61161*

drawn by this claimant on the Sassari office for 24,360 lira, being the draft which is the subject of this controversy.

The testimony is undisputed that the Bankrupts had a right to cancel drafts advised *only in cases where the drawer bank first notified them that it desired to cancel the draft* and it is also undisputed that the Bankrupts had never assumed to exercise such a right *except in cases where they had first been advised by the drawer bank "That the draft had been lost or would not be presented to the drawee Bank for payment"* (fols. 282-284). There was no such notification in this case.

Whether, upon receipt of the Receiver's notification to "Cancel all drafts charged but not paid before receivership," the B. C. I. assumed that the receiver was within his rights, as between him and the drawer banks, need not now be considered. The fact is that the Receiver was *not* within his rights, and having, in violation of right, procured possession of the fund which had been set apart to pay these drafts, he is in no position to keep that fund as against the holders of the drafts.

It is stipulated that the amount shown on Claimant's Exhibit 19B was returned to the Receiver by the payment of its equivalent in dollars, to wit, $67,548.06 (fol. 111).

Brief of the Argument.

The claimant contends:

I.

Equitable assignment is a matter of intention. The intention to create an equitable assignment, and the actual creation thereof, clearly appear from the undertakings of

the Bankrupts as set forth in the Drawing Service, followed by the Bankrupts' directions to their foreign correspondent and the acts of the foreign correspondent, with the knowledge and acquiescence of the Bankrupts, upon the foreign correspondent's receipt of the Bankrupts' directions.

II.

By the express terms of the Drawing Service the Bankrupts were merely the agents of the claimant to provide Banca Commerciale Italiana with moneys, supplied by the claimant, to meet the draft which claimant had drawn.

POINT I.

Pursuant to the terms of the drawing service, the Bankrupts caused Banca Commerciale Italiana to create, out of the Bankrupt's funds on deposit with Banca Commerciale Italiana, a fund for the payment of the draft involved in this proceeding. Thereby an equitable assignment of the moneys was effected.

Equitable assignment is a matter of intention, to be determined from the circumstances of the case and the acts and declarations of the parties. If it appear that there is an intent on the part of a creditor to have his debtor set aside and appropriate, for the benefit of a third party, a portion of the funds of the creditor in the hands of the debtor, followed by some act of appropriation by the debtor at the creditor's request, an equitable assignment in favor of such third party takes place.

What more cogent proof could be presented than is stipulated in this case to show that K., N. & K. intended that B. C. I. should, and that B. C. I. in fact *did*, set aside, out of moneys of K., N. & K. in its hands, a sum for the payment of the draft here in controversy?

K., N. & K. notified B. C. I. that the draft had been drawn and directed B. C. I. to charge the same against its account and honor the draft when presented. B. C. I. did charge the account of K., N. & K. with the amount of the draft, and the amount so charged was taken out of K., N. & K.'s account and put into an account maintained by B. C. I. for the payment of drafts advised. This account included, as the stipulation admits, not only moneys appropriated for the payment of drafts drawn under the K., N. & K. Drawing Service, *but moneys appropriated for the payment of drafts drawn by others as well. The Bankrupts had no rights in the moneys in that account—they were held by the foreign bank "in a special fund" to accomplish "exactly the same result" as was originally accomplished by "earmarking each particular bag for a particular purpose" and putting it aside "in a box" to "await the presentation of the draft"* (fols. 348, 356-357, 369-370, 372). Once the money was taken out of K., N. & K.'s account, they ceased to receive interest on it, although they did receive interest on the moneys which *were* in their account.

In reporting to K., N. & K. with respect to the amount of its balance in its hands, B. C. I. showed K., N. & K., by its statements, that it did not treat as any part of K., N. & K.'s balance in its hands the moneys which had been taken out of the account and credited to the Drafts Payable account. This practice, it is stipulated, was proper.

Of course, if there had been an equitable assignment, *the money ceased to be the property of K., N. & K.*; K. N. & K. had no right to demand the return of it and its receiver had no greater right. The receiver did, with full knowledge of the facts, assume to take possession of this money, which did not belong to the Bankrupts, and which is, accordingly, no part of the bankrupt estate. The moneys returned are earmarked by the Exhibit which explains how they are arrived at and which shows that *they include the very moneys which had been set aside and were being held to pay the draft in controversy here.* The claimant as the holder of that draft is the owner of this money and is entitled to reclaim it.

Coates v. *First National Bank of Emporia*, 91 N. Y. 20;

Risley v. *Phoenix Bank*, 83 N. Y. 318;

Throop Grain Cleaner Co. v. *Smith*, 110 N. Y. 83;

Rivers v. *A. & C. Wright Co.*, 43 Southeastern 499;

Muller v. *Kling*, 209 N. Y. 239;

Fourth St. National Bank v. *Yardley*, 165 U. S. 634;

Fortier v. *Delgado & Co.*, 122 Fed. 604;

Hackett v. *Campbell*, 10 App. Div. (N. Y.) 523, aff'd 159 N. Y. 537.

The case of *Coates* v. *First National Bank of Emporia*, 91 N. Y. 20, is a leading authority. The facts were as follows:

The First National Bank of Emporia, Kansas, was a depositor in the Mastin Bank of Kansas City. Both the Mastin Bank and the First National Bank were depos-

itors in the bank of Donnell, Lawson & Co., in New York City. On July 30, 1878, the First National Bank of Emporia, having then more than $5,000 on deposit in the Mastin Bank, directed the Mastin Bank, by letter, to remit $5,000 to Donnell, Lawson & Co. "for our account; credit and charge our account." On August 1st, the Mastin Bank received this letter and acknowledged it, advising "We remit $5,000 to Donnell, Lawson & Co., New York, to your credit." The Emporia Bank, upon receipt of the letter, credited the Mastin Bank with $5,000 and charged that amount to Donnell, Lawson & Co. On August 1st, the Mastin Bank mailed to Donnell, Lawson & Co., a paper reading

> "Pay to the order of credit, the First National Bank, Emporia, Kansas five thousand dollars.
> To Donnell, Lawson & Co."

accompanied by a letter to Donnell, Lawson & Co. to the effect that they would find enclosed, for the credit of the Emporia Bank, $5,000. On mailing this letter the Mastin Bank charged $5,000 on its books to the Emporia Bank and credited that amount to Donnell, Lawson & Co.

Two days after these transactions the Mastin Bank assigned to the plaintiff.

Donnell, Lawson & Co. received notice of the assignment by telegraph from plaintiff August 5, 1878, and on the same day, a little later, the letters and orders above mentioned were received by them.

The plaintiff, as assignee of the Mastin Bank, demanded payment of the balance appearing to be due to the Mastin Bank at the date of the assignment. The defendants also demanded payment of the orders. Donnell, Lawson & Co. paid into court the full amount of the

apparent credit and thereupon the defendants were substituted in their place as defendants.

The object of the suit was to determine the title to this fund.

The Court said:

> "* * * It seems to be well settled that a mere check or draft does not operate as an assignment or appropriation of the drawer's deposit in favor of the payee before acceptance by the bank (*Harris* v. *Clark*, 3 N. Y. 93; *Atty. Genl.* v. *Continental Life Ins. Co.*, 71 id. 325; 27 Am. Rep. 55), but the doctrine has not been extended beyond instruments of that character, drawn in the ordinary form; nor to a transaction not restricted to the very terms of such paper. * * *
>
> "I am unable to see why, on the first day of August, there was not a complete and consummated contract between that bank and the Mastin Bank. The Mastin Bank, up to that day, owed the Emporia Bank, and was requested to pay its debt by transferring funds then with Donnell, Lawson & Co. They say by letter, 'we will do so,' at once charge the Emporia Bank, and credit themselves with $5,000; on the same day, by letter, they inform the Emporia Bank that this has been been done, and in fact they direct Donnell, Lawson & Co. to 'pay to the order of credit, the Emporia Bank,' the sum named. The Emporia Bank also credited the Mastin Bank with it. These circumstances in the conduct of both parties establish an agreement, the effect of which, as between the Mastin Bank and the Emporia Bank, was to estop the former from setting up that so much of the credit to which they were before entitled from Donnell, Lawson & Co. did not belong to the Emporia Bank, and the Emporia Bank from saying that so much of the debt before due from the Mastin Bank to it had not been extinguished. (*Allen* v. *Culver*, 3 Den. 284.

292). Written out, the contract indicated by the book entries and the correspondence is one of assignment of so much of the credit, or funds then to its credit with Donnell, Lawson & Co., to the Emporia Bank, and a discharge of a debt due by it to that bank. *The whole was completed the moment the letter of the Mastin Bank to the Emporia Bank was placed in the post-office.* • • •

"Nothing further remained to be done. • • • As between these parties the credit or funds had ceased to be the property of the Mastin Bank. The Emporia Bank was no longer creditor, because it was paid. The credit, or right to call upon Donnell, Lawson & Co. for the same amount, was the means of payment. • • •

"• • • Here by the act of the customer, the title to the account itself had passed from him, and the check, or order, as it may more properly be called, was, between the customer and the assignee —the Emporia Bank, of no importance. *The bankers, by virtue of the assignment, owed the money specified in the account, to the Emporia Bank, and it was not a matter as to which they had any discretion to exercise.* • • •"

The Court, after citing *Burns* v. *Carvalho*, 4 M. & C. 890, a leading English case, continued:

"In the case before us, as in that, there was an existing fund in the agent's hands and a distinct contract by the debtor with its creditor, to discharge the liability out of that fund, and to give directions for that purpose. • • •

"I have not overlooked the contention of the respondent that the entries were mere matter of bookkeeping for the convenience of the bank. It might be so if they stood alone. But taken in connection with the letters between the parties, and

the order and letter of advice sent to Donnell, Lawson & Co., *they are equivalent to an actual transfer of credit, or account; to an assignment, therefore, at least in equity, of the fund in the hands of Donnell, Lawson & Co.* * * *

"In *Pratt* v. *Foote* (9 N. Y. 463) the plaintiff, a private banker, was held charged as on an agreement by entries made in the books of his bank, although not communicated to the defendant, and the latter was relieved from an obligation by reason of them. *In the case before us the entries were preceded by the letter of the Emporia Bank, requesting a transfer of credit, accepted by the Mastin Bank, and the books made to conform thereto. Taken together they conclude the Mastin Bank and of course its voluntary assignee.* * * *

"It follows that the fund did not pass to the assignee. (*Hopkins* v. *Banks*, 7 Cow. 650; *Muir* v. *Schenck, supra; Osborn* v. *Thomas* 46 Barb. 514). The assignment to him is dated August 3; it purports to transfer the property 'and credits' of the Mastin Bank; of course it speaks as of the day of its date, *and on that day the credit in question was not its property. It could not withdraw or change its application and so revive its indebtedness to the Mastin Bank, or that of the defendants to itself.* It does not appear, however, that the Mastin Bank undertook to again deal with this fund, or to assign it to its trustee, nor, if it had been possible to do so, that it undertook to deprive the defendants of the benefit of the contract under which they claim. It follows from these observations that the learned referee erred in finding that the money in question passed by assignment to the plaintiff, and that the defendants were not its owners."

The other cases cited above are to the same effect.

The Trustee relies on *Re Interborough Corp., Noyes* v. *Bank* and *Eastman-Kodak* v. *Park Bank* as authorities against the claimant (Brief, pp. 21, 23, 24).

These cases are clearly distinguishable from the present case and the *Interborough* case expressly recognizes the distinctions and points out that the result would have been different if there were present some or all of the circumstances which are present in the case at bar. That case is really an authority in the claimant's favor. It involved the relation of debtor and creditor between the corporation and its bank and merely held that where a depositor, for its own convenience, directs that a portion of its funds shall be carried in an account against which checks for interest on bonds will be drawn, the bondholders acquire no trust in the deposit. *The court expressly recognized that if the creditor were told of the setting apart, and assented thereto, a different situation would arise* (288 Fed. p. 345), citing from *Story on Equity:*

> "* * * But if upon notice the creditors should assent thereto and no intermediate revocation should have been made by the assignor or remitter, there in equity the assignee or mandatary will be held a trustee for the creditors. * * *
>
> "* * * It may be revoked at any time before it is executed, or at least before any engagement is entered into by the mandatary with the third person to execute it for his benefit; and it will be revoked by any prior disposition of the property inconsistent with such execution. *But if no revocation is made and the mandate continues in full force, the trust as such continues for the benefit of such third person who after his assent thereto notified to the mandatary may avail himself of it in equity without any reference to the assent or dissent of the mandatary upon such*

> ***notice; for his receipt of the property binds him to follow the orders of his principal.***"

In our case it was well understood between the parties that the fund would be created abroad. In fact the claimant entrusted the Bankrupts with its money on the faith of the Bankrupts' assurance that that would be done, the Bankrupts, in their "Drawing Service" having agreed to

> "provide the drawee with funds sufficient for the payment of the draft abroad, by a transfer of credit from our balance, or otherwise."

Hence the foregoing quotation from the *Interborough* case applies. In the *Interborough* case the court pointed out that the money on deposit in the bank (p. 346)

> "was not received by the latter under instructions to distribute it among specified creditors, or to the coupon holders. It was received by the Empire Trust to be paid out on account checks to be drawn by the Interborough and directed to be charged against the separate account which had been created."

In our case there was no such situation. The money set apart by the Banca Commerciale Italiana was to be paid against the draft drawn by claimant and not upon any subsequent order of the Bankrupts.

The following principles were laid down as established by the court in the *Interborough* case (p. 347):

> "If A. places money in the hands of B., to be delivered to C., a trust arises in favor of the latter. The acceptance of the money with notice of its ultimate destination creates a duty on the part of B. to devote it to the purpose intended, and a court of equity will enforce the trust. *McKee* v. *Lamon*,

159 U. S. 317, 322, 16 Sup. Ct. 11, 40 L. Ed. 165. In this instance also A. parted with control over the fund when he placed it in B.'s possession.

"Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity as a trustee, for a breach of trust."

thus recognizing the very rule for which we contend. The rule for determining whether an equitable assignment exists, as stated in 19 American and English Encyclopedia of Law, Second Edition, page 16, was adopted by the court in the following language (p. 349):

"But a mere agreement to pay a debt out of a designated fund does not give an equitable lien upon the fund, or operate as an equitable assignment thereof. *There must be an appropriation of the fund protanto, either by giving an order, or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor.*"

In our case there was an appropriation of the fund, both by the giving of the order from the Bankrupts to Banca Commerciale Italiana and by the transferring of the money by Banca Commerciale Italiana from the Bankrupts' account to Banca Commerciale Italiana's unpaid draft account, out of which the Banca Commerciale Italiana was

"authorized to pay the amount directly to the creditor without the further intervention of the debtor."

The court also recognized the rule (p. 349):

> "• • • But it is now definitely settled in the Federal Courts that a promise based on a consideration to pay out of a particular fund creates a lien on the fund, which attaches to the fund when it comes into existence and which equity will enforce, holding the promisor to be a trustee as soon as he gets title. *Barnes* v. *Alexander*, 232 U. S. 117, 120, 121, 34 Sup. Ct. 276, 58 L. Ed. 530."

It is perfectly apparent from what has been said, that the *Interborough Consolidated Corp.* case is not only no authority against the claim of the claimant in this proceeding, but that in that case the court distinctly recognized that if there were present there some of the facts and circumstances which are present here, an equitable assignment would have resulted.

The *Noyes* case was almost identical on its facts with the *Interborough* case. For the same reasons stated with respect to the *Interborough* case, the *Noyes* case is not an authority against the claimant. It held merely that where a corporation deposits its money in a special account *in its own name*, to meet interest coupons on bonds as they become due, there is created merely the relation of debtor and creditor and the depository does not become a trustee in favor of the coupon holders. In that case the corporation opened a bank account designated by the bank "Chicago, Rock Island & Pacific Railroad Co., Coupon Account," and transferred to this account a sum of money from the corporation's general account. The money still was in an account in the depositor's name. In our case the money was taken out of K., N. & K.'s account and put into the foreign bank's own account, which it called "Drafts Payable," and which was

a record of "its" obligations on drafts advised. This account, as Dawson testified, was the record of moneys set aside "in a special fund awaiting the presentation of any drafts against that fund." It was a fund which performed the same function as was originally accomplished by the drawee banker by putting "the money in his box or in his office" there to be held "useless, awaiting the presentation of the commitment or draft." Surely there is no analogy between such a fund and money which a depositor puts into his bank under circumstances like those in the *Interborough* and the *Noyes* cases. The distinction is, that although a fund may be designated as the fund out of which certain commitments will be paid, that fund does not become the property of the holder of the commitment *as long as the fund remains in the depositor's name and under his dominion*. As we have shown, the money in the "Drafts Payable" account was not the property of K., N. & K.

In the *Eastman* case, the depositor merely directed his banker to pay checks drawn by the depositor. This direction, though given with respect to specific checks, added nothing to the obligations of the banker, because it was the banker's duty, irrespective of this notification, to pay the checks drawn by the depositor as long as the depositor's account contained sufficient moneys. In that case the banker did not, upon receipt of the notice, charge the depositor's account and credit the funds to another account in which the bank kept a record of *its* commitments; there was no notification by the bank that it had so debited the depositor's account and credited its own account; there was no approval of this procedure by the depositor, as there was by K., N. & K. in the case at bar. The money always remained the deposi-

tor's money in an account in the depositor's name. The *Eastman* case bears no resemblance to this case and is no authority against the claimant here.

It is unnecessary to discuss the other cases cited by the Trustees in Point I of his brief because they are in the main subject to the same comments as the *Eastman* and the *Interborough* and the *Noyes* cases.

The authorities establish that there was an assignment by the Bankrupts of their funds in the hands of the Italian Bank for the payment of the draft and that the money so assigned ceased to be the property of the bankrupts; that once the assignment took place, the bankrupts had no right to countermand or interfere with it. The Receiver can have no greater rights than the Bankrupts; hence the money does not belong to him. It is stipulated (fols. 330-331):

> "That after the draft in question was presented and payment refused by the Banca Commerciale Italiana, the draft was returned to the purchaser, Bachisio Tabasco, and that thereupon the First National Bank of Trinidad paid to the said Tabasco the sum of $1,128.87 and thereupon the said Tabasco delivered the said draft to the First National Bank of Trinidad."

The assignment of the funds in the hands of Banca Commerciale Italiana was made to "protect" the said draft and Banca Commerciale Italiana thereupon held the money "as a special fund" and "for a particular purpose," to wit: "Awaiting the presentment of the draft" (fols. 348, 356-357).

The draft was duly presented and by the Receiver's direction not paid. The money was remitted to the Receiver who, in turn, turned it over to the Trustee. The

Claimant, which issued the draft and provided the Bankrupts with the money with which to protect it, are now the owners of the draft. In these circumstances the money belongs to it.

> *Cutler* v. *Bank*, 113 N. Y. 593;
> *Kingman* v. *Hotaling*, 25 Wend. 423;
> 8 *Copus Juris*, pages 83-372-831-1004;
> and cases cited *supra*.

The Trustee contends (p. 5) that there was no equitable assignment because there was no obligation on the part of K., N. & K. to create the fund "in advance," its obligation being merely to have funds in the foreign bank applicable to the payment of the draft when the draft is presented. While it would not make any particular difference in the circumstances of this case whether there was or was not such an obligation, owing to the fact that the credit was actually *created* and maintained until long after bankruptcy, it should be observed that the Trustee's statement of the Bankrupt's obligation does violence to the precise terms of the drawing service, which provide *not* that the Bankrupts should cause the necessary balance to be in the hands of B. C. I., by the time the draft should be presented, but that upon the receipt of the advice of the drawing of the draft

> "our advices are *at once* forwarded and funds provided with the respective drawee banks for the payment thereof" (fol. 420),

and which also provide (fol. 422) that upon receipt of the advice

> "we shall *promptly* forward our advice of the same and provide the drawee banks with funds sufficient for the payment of the draft abroad."

Whatever may have been the practice of the Bankrupts with respect to delaying their notifications to the foreign banks,—that is, speculating against the market without the knowledge of the inland banks—the fact remains that under the drawing service *they represented to the inland banks that they would provide the fund abroad "promptly" and "at once" upon the receipt by them of notice that the drafts had been drawn* and "adequate funds" to cover payment. They did *not* merely undertake that by the time the draft would be presented they would have a sufficient *credit* there. Their credit was not involved. The drafts were neither *drawn* by them nor *payable* by them and the holder of the draft would have no claim against them nor recourse to any balance in their favor.

The Trustee argues (p. 32) that the absence of an equitable assignment is to be inferred from the circumstance that K., N. & K. did not direct the foreign bank to set up an account in favor of claimant, but that the foreign bank credited all drafts advised

"in an omnibus Draft Payable account."

The foreign bank could, of course, if it had chosen, have credited the moneys to an account in claimant's name, but that was not the *only* method and the failure to adopt that method does not indicate that some other method was just as effective. K., N. & K. had no control over the foreign bank's internal bookkeeping procedure and was not interested in the manner in which the foreign bank made a record of its obligations. From the

point of view of the foreign bank, however, the bookkeeping involved in carrying their obligations on drafts advised in the "Accounts Payable" account, was much simpler than setting up a separate account in favor of each of the thousands of inland banks which might draw drafts under the Drawing Service and that is probably why this method was adopted.

The evidence shows that upon receipt of advice of the drawing of a draft, B. C. I. credited the necessary amount to the "Draft Payable" account *and made appropriate notations to show that the sum so credited was to be applied to the payment of the particular draft* (see fol. 508 *et seq.*) In crediting moneys to meet drafts advised to "Drafts Payable" account B. C. I. created an account which, in legal effect, was exactly the same as the special account usually maintained by a lawyer, in which he deposits collections made on behalf of his clients. He does not open a separate trust account for each client each time he makes a collection. He has one omnibus account in which he deposits all such collections. It is a trust account for the benefit of his clients to the extent that their funds respectively have been put into it. So it was with the "Drafts Payable" account of B. C. I. The moneys which went into it they held for particular purposes, to wit: the payment of the various drafts noted in it. There was a trust in favor of the holder of each draft to the extent that money for the payment of that draft was in the account and the mere fact that this method was adopted in preference to opening separate accounts in favor of the respective drawer banks is of no greater significance than the lawyer's failure to open a separate trust account for each client for whom he makes a collection.

The entering of a notation of the name of the bank whose account had been charged with the moneys credited to the "Drafts Payable" account by no means indicated, as the Trustee asserts (pp. 33-34), that the moneys credited to the "Drafts Payable" account "still belonged to K., N. & K." Mr. Dawson, in whose testimony this statement is claimed to find support, gave no such evidence. What he said was (fol. 350) that when the credit was made in the "Unpresented Drafts Drawn" account (meaning the "Drafts Payable" account), an entry was also made of the bank "whose account has been charged." This is an entirely different statement from what the Trustee's Brief attributes to Dawson. The entry referred to by Dawson is simply the common, everyday "cross entry," by which an item in an account can be traced back to the source from which it came. The entry merely facilitated B. C. I. in determining from the account of which of its depositors the particular item credited had come.

The Trustee urges that there could not have been an equitable assignment because the holder of the draft did not know of the provisions of the Drawing Service or of the creation or the existence of the "Drafts Payable" account (p. 9). It was entirely unnecessary for the holder of the draft to know any of these facts. An equitable assignment would result, not from the facts known to the holder of the draft, *but from the acts and conduct of the Bankrupts and their foreign correspondents.*

POINT II.

Moneys remitted to the Bankrupts in connection with the drawing of a draft under the terms and provisions of the Bankrupts' Drawing Service were received by the Bankrupts as agents of the remitter for the purpose of applying the same to the payment of the draft.

Not only is the agreement clear upon the relationship of the principal and agent, *but the very nature of the transaction shows that an agency was intended.* The Claimant had drawn a draft payable in Italy. It was necessary *for the Claimant* to provide the foreign bank with money with which to pay the draft when presented. This the Claimant could do in one of two ways. It could either *personally* provide the drawee bank with the money for use in paying the draft when presented, or else it could engage *someone else* to do so for it. The Bankrupts held themselves out as peculiarly well fitted to act as Claimant's "agent" for the performance of this "function." They stated that if the necessary funds were sent to them, they would notify the drawee bank of the drawing of the draft and "provide for the payment thereof," pointing out on two separate occasions and in the clearest terms that in the performance of this "function *we act as agents of the drawers.*" There can be no doubt about the nature and the subject of the agency. The Bankrupts undertook, as the Claimant's agent, to perform *for the Claimant* a "function" which the Claimant would otherwise have had to

perform itself, to wit: *put into the hands of Banca Commerciale Italiana the money which the Claimant would provide for the purpose of meeting the draft which the Claimant had drawn.* In addition to describing themselves as "agents," the Bankrupts estopped the inland banks from claiming that K., N. & K. were something more than agents by providing in the "Issuing Banks Record" (fols. 479-480), (being the stub in the book of Foreign Drafts, which would remain with the issuing bank after the draft was issued and the advice mailed to K., N. & K.) that the moneys paid to K., N. & K. were paid to them as "*Transfer Agents.*"

The relation of principal and agent is expressly provided for in the Drawing Service, which constitutes the written agreement between the parties; this agreement was prepared by the Bankrupts in language chosen by them; even if the undertaking to act as agent were not as clear and as unequivocal as it is, the language would have to be construed against the Bankrupts, who selected it. The inland banks, in drawing drafts and in entrusting their money to the Bankrupts under the provisions of the Drawing Service, had a right to, and did, rely upon the existence of this relationship. The nature of the transaction shows that the word "agent" in the Drawing Service was intended to mean what it said. In these circumstances the appellant respectfully urges that the position of the Claimant should not be prejudiced upon the theory that the words of the Drawing Service did *not* mean what they said.

A reference to the legal precedents shows that the principles involved are neither new nor novel but on the contrary have been frequently stated and authoritatively decided.

The rule has long been established in England that sums of money delivered to a bank for the payment of an obligation of the payor at some other place is money held by the bank in trust for a specific purpose and if not so applied belongs to the payor. The leading English case is *Farley* v. *Turner*, 26 L. J. Ch., 710. It has been frequently cited and followed in the American decisions. In this case one Goodwin having accepted a bill, payable at Robarts & Co., paid into the hands of his bankers, Messrs. Farley, Turner & Jones, the sum of £707. He told the bankers' clerk that £500 of this money was to be used to meet said acceptance on December 14th, and he notified Farley, Turner & Jones in writing to advise Robarts to pay the same. The bankers thereupon sent to Overend & Gurney certain bills to discount and directed them to pay the proceeds to Robarts for the purpose of meeting Goodwin's acceptance, as well as others. This was done on the 11th of December and on the morning of the 12th Robarts received information that Mr. Turner of the firm of Farley, Turner & Jones, had died the preceding evening and the firm had ceased to carry on business. The £500 was not applied in payment of Mr. Goodwin's acceptance but was subsequently paid over to the representative of Mr. Turner's estate. Vice-Chancellor KINDERSLEY held

> "that the £500 belongs specifically to Goodwin and not to the general creditors of Mr. Turner."

In the course of his opinion he said (p. 711):

> "According to the statement in the case, it appears that at the time of paying in the £707 Goodwin told the clerk that £500 of this money was to be applied for the specific purpose of meeting an acceptance payable at Robarts & Co.'s, to become due on the 14th. Goodwin at the same

time signed the notice before stated. Now, what was the effect of this direction to the bankers? Goodwin in effect said, 'There is a bill which I want paid at Robarts & Co, therefore send them £500 of this money and advise them to apply it in payment of this bill.' The direction is accepted by the bankers, or by their clerk, which amounts to the same thing, and the clerk did what appears to be usual. There was no negligence on his part; at the same time he placed the whole amount of £707 to Mr. Goodwin's general banking account. He might certainly have sent up a cheque for £500 to Messrs. Robarts & Co., and placed the remaining sum to Mr. Goodwin's account, but he took the ordinary course and sent up the £500, debiting Mr. Goodwin's banking account with that sum, and they informed Robarts & Co. that such a bill would be presented. Now, it so happened that the Kidderminster Bank had other bills, more or less under similar circumstances, which they wanted paid at Robarts' bank, and they sent up a batch of bills to Messrs. Overend & Gurney for them to discount, and directed them to pay the amount into Robarts & Co.'s bank for the purpose of meeting other bills, as well as that for £500. It appears to me that the course pursued was the same as if, having no occasion to pay more than the £500 bill, they had simply sent up the specified amount with a direction to pay that particular bill. *It is true that the money was not earmarked as if it had been locked up in a box, but it is a portion of the £707 which had been paid in expressly for the purpose of meeting the bill for £500.* The facts of this case differ, I think, from the cases cited. I admit that the money is not a particular deposit with the bankers, but *it is money placed in their hands to be applied in a particular way.* What I now decide will not trench upon the authorities which decide that money paid into a banker's is not a deposit

which you may receive back in the identical notes and sovereigns, but that it is a debt. *That is quite a different case.*"

See also, *Giles* v. *Perkins*, 9 East. 12, and *Burdett* v. *Willett*, 2 Vernon 638.

The American rule, both State and Federal, follows closely the law of England and is stated in the following cases:

In re Jarmulowsky, 258 Fed Rep. 231;
In re A. Bolognesi & Co., 254 Fed. Rep. 770;
City of St. Louis v. *Johnson*, 5 Dillon 241;
Massey v. *Fisher*, 62 Fed. Rep. 958;
Moreland v. *Brown*, 86 Fed. Rep. 257;
People v. *City Bank of Rochester*, 96 N. Y. 32;
Cutler v. *American Exchange Natl. Bank*, 113 N. Y. 593;
People ex rel. Zotti v. *Flynn*, 135 App. Div. 276;
Peak v. *Ellicott*, 30 Kansas, 156, 1 Pac. 499;
Ryan v. *Phillips*, 3 Kans. App. 704, 44 Pac. Rep. 909;
Star Cutter Co. v. *Smith*, 37 Ill. App. 212;
Roca v. *Byrne*, 145 N. Y. 182.

In *City of St. Louis* v. *Johnson* (5 Dillon 241) the plaintiff kept two accounts in the National Bank of the State of Missouri (which suspended payment and went into liquidation on June 19th, 1887). From these accounts the City drew moneys from time to time to provide funds for bonds and coupons of the City falling due and payable in the City of New York. It was the custom

of the City Treasurer to draw a check on the National Bank of the State of Missouri for the amount necessary to be placed in the New York bank to pay maturing bonds and coupons, endorse the check and deliver it to the bank with written instructions to remit the amount to the National Bank of the Republic or the National Bank of Commerce in the City of New York to pay bonds and coupons of the City of St. Louis falling due. Thereupon the National Bank of the State of Missouri would remit or provide a credit for the amount specified to the New York Bank with written instructions to the said Bank to pay and charge to the general account of the National Bank of the State of Missouri the bonds and coupons of the City of St. Louis maturing at said Bank and to forward the same cancelled to the National Bank of the State of Missouri. The National Bank of the State of Missouri paid the City of St. Louis interest on its average daily balance in its current account but none on the sums remitted to New York after the bank received the check of the City Treasurer therefor. The Court said:

> ... The bank was the general debtor of the city, having funds subject to its check or draft. Let us take the transaction of April 25th, for it represents all the others. The city comptroller directs the city treasurer 'to remit' to the Bank of the Republic $51,000 to pay the bonds and coupons of the city falling due at that bank on the following month. On the same day the city treasurer draws in favor of the bank his check for the amount and encloses it to the president of the bank, with directions, *inter alia*, 'to remit' to the Bank of the Republic, in New York, $51,000, 'to pay bonds and coupons of the city falling due (at that bank) in May next.' The bank at once charges the amount of that check to the city, which

has the effect to reduce the city's balance with the bank and to stop interest to that extent. If the money had been passed over the counter to the city treasurer, and he had delivered it to another bank, with instructions to remit to a particular bank for a specified and definite purpose, such bank would have been the agent of the city to remit or transmit the money of the city; it would remain the money of the city, notwithstanding it may have been credited on account to the agent, and not to the principal, and this with the consent of the two. If such bank had transmitted the money by express, the money would be the city's; if by draft, it would be the agent of the city for that purpose; but when its instructions were obeyed and the money duly received by the appointed depository, all liability would be at an end. If the appointed depository failed, the loss could not be thrown upon the agent.

"But the money was not paid over the counter ot the city, and the city did not select some other agent or bank to remit or transmit it to the Bank of the Republic, but selected its general depository to make the remittance, and accepted a credit in another account for the same sum. The bank remitted the sum, as directed by the city, to the Bank of the Republic, with specific directions to credit the amount to it, and to use the same 'to pay the bonds and coupons of the city maturing at your bank next month,' and charge the amount to the account of the bank here, and forward to this bank the bonds and coupons cancelled.

"The letter of the treasurer to the president of the bank made the bank here the agent of the city to remit, and if the bank here did remit accordingly, and placed the sum with the designated bank, i. e., the Bank of the Republic, it did its duty, and would not be liable to the city if the Bank of the Republic had failed with this fund on hand. * * *

"The bank charged the city with exchange on the amount it thus received, the same as it would have charged if the draft had been for any other customer. It became the agent of the city to transmit the money. The money, when placed in the Bank of the Republic, was, as between the Missouri bank and the city, the money of the latter. When the agent presented coupons cancelled, this showed that the agent had discharged the duty it had undertaken.

"It is my judgment that the relation between the Missouri bank and the city, as respects the money deposited with the Bank of the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri bank in its name with the Bank of the Republic, were, as between the former bank and the city, *trust moneys*, and in equity they belong to the *cestui que trust*, and the latter has the right to pursue and claim them as against all persons who do not stand free of the trust."

The other cases cited above are to the same effect.

The Trustee relies on *Legniti* v. *Mechanics & Metals Natl. Bank*, 230 N. Y. 415, and *Beecher* v. *Cosmopolitan Trust Co.*, 239 Mass. 48, in support of his claim that there was initially no trust relationship.

In the *Beecher* case the plaintiff, as appears from the opinion (page 52) paid money to the trust company in consideration

"of an agreement by the defendant trust company that it would procure and provide funds in Roumania to meet *the order which it had sold and delivered to the plaintiff*."

The case involved merely the purchase and sale of credit. The plaintiff had bought from the defendant a remittance order, which is similar to a draft, and the case is an authority only in cases of purchases and sales of credit (See *Equitable* v. *Keene*, 232 N. Y. 290, 295).

The Trustee relies on the *Beecher* case because in the printed receipt given to the purchaser appeared the words: "It is expressly agreed that Cosmopolitan Trust Company acts as agent only for the sender." It will be observed that these words were not contained in any *contract*. They were contained merely in a "receipt" which was probably a printed form, broad enough in its terms to cover every transaction which might arise, including those in which an agency might exist. The words quoted could not have been intended to apply to the transaction with the plaintiff, because the transaction was a *sale;* there was no "sender" for whom the Trust Company could act as "agent" and no possibility of an agency in the circumstances of the case. In the present case, on the contrary, the provisions for an agency are expressed in a long and carefully drawn *contract*, which is clear and explicit, which is applicable to transactions of the nature of the one here involved *and was drawn expressly for use in such transactions*. The *contract* here is not in the same category with the *receipt* issued in the *Beecher* case, nor are the facts and circumstances of this case similar to those of the *Beecher* case. In the *Beecher* case the bank sold its credit. It drew its *own* draft payable abroad, and in consideration therefor the plaintiff paid his money. In the case at Bar the Bankrupts did *not* draw their own draft (folios 419, 474). In conformity with the Drawing Service the draft was drawn by the claimant in its own name, "for its own account as principal and our

(K., N. & K.'s) name does not appear" (folios 419, 474). The holder of the draft acquired no right against K., N. & K. They had, for a consideration, merely agreed to receive a fund provided by the maker of the draft "to cover" its payment and to accept "*employment*" from the maker (folio 423) as its "*Agent*" to provide the drawee bank "at once" with the money for the payment thereof. The use of these protective clauses was not accidental or inadvertent. They had a very definite purpose in limiting their relation to that of an agent; they were guarding against any responsibility for defaults by the foreign banks after the fund was delivered to them. They were not unfair or unreasonable in taking this precaution because their profit did not justify their assuming any such obligation. We respectfully submit that this is altogether a different case from the sale of credit involved in the *Beecher* case. As the court said, the undertaking of the bank there "was a contract obligation, based upon the payment of the money, to have funds in Bucharest with the bank, which funds should be sufficient to insure the payment of the order on presentation." There was no such obligation on the Bankrupts here. It was immaterial whether they would have credit with the B. C. I. at the time the draft would be presented. Their obligation was merely to see that the fund with which to pay the draft was delivered to B. C. I., and this obligation they assumed only upon the prior receipt by them of the equivalent amount, plus their charge for the service. They did not even need to have an account with B. C. I. They could provide the fund "by transfer of credit from our balance, *or otherwise*" which means as the Court pointed out in the *Legniti* case "in any form recognized in financial circles." The outstanding point

about the *Beecher* case and the other cases cited by the Trustee is that in all of them the banker drew against its own credit abroad and *merely undertook that it would have a credit balance in the foreign depository at the time its order was presented there.* Hence the transaction is described as a purchase and sale of credit. In such cases

> "the seller engages that he has the balance at the point on which the payment is ordered" (*Legniti* v. *Bank*, 230 N. Y., at p. 420).

In the present case there is no such situation. There was no representation by K., N. & K. that they had such a credit balance or that they would have such a credit balance on the date of the presentation of the draft and neither Claimant nor the holder of the draft was concerned with that question. The draft was not drawn by K., N. & K. and no recourse could be had against its balance for the payments thereof.

The *Legniti* case cited by the Trustee (page 43) was also a sale of credit. In that case the plaintiff purchased a cable transfer. In such cases, as the court pointed out (page 420) there is involved

> "a method of transmitting money by cable *wherein the seller engages that he has the balance at the point on which the payment is ordered* and that on receipt of the cable directing the transfer his correspondent at such point will make payment to the beneficiary described in the cable. All these transactions are matters of purchase and sale and create no trust relationships."

There was in our case no engagement by the Bankrupts that they had "the balance at the point on which the payment is ordered" and there was no requirement

that they should have it. In our case they merely undertook, as the claimant's agents, upon being first supplied with the necessary moneys, to provide the fund abroad with which to pay the draft drawn by the claimant. The court distinctly recognized the distinction between cases calling for the transmission of money abroad and those in which only a credit is purchased (pp. 420-421) and said that in the former cases

> "the bank or transmitter is the agent of the person paying the money, and until the money is sent holds it as agent or trustee for the owner. Such were the cases of Musco v. United Surety Company (132 App. Div. 300) and People ex rel. Zotti v. Flynn (135 App. Div. 276). In these latter transactions the intention of the payer is that the money he gives to his agent shall be sent abroad. It is the amount which he gives that is to be transmitted. *How it is sent may be immaterial to him. If there be time, currency might be purchased and sent. If not, it may be transmitted in any form recognized in financial circles. It is not at all necessary that the sender or agent have credit in the place to which the money is to be sent.*"

These words apply to our case. A certain amount was to be transmitted. How it was sent was immaterial to us. It could be "transmitted in any form recognized in financial circles" and it made no difference whether K., N. & K. had an account there or not.

The Trustee asks (pp. 40-41):

> "Does the respondent seriously argue that the intention underlying the drawing service as agreed to by the parties was that the large and small banks scattered throughout this country who had no knowledge of foreign banks and bankers, were

paying over their money to K., N. & K., relying on the credit, solvency and responsibility of foreign correspondents in scattered communities throughout Europe, wholly unknown to them and chosen by K., N. & K.?"

We have no hesitation in saying that in our opinion, under the terms of the Drawing Service, K., N. & K.'s obligation ceased the moment they put into the hands of the foreign bank a fund "sufficient to cover" payment of the draft and that they were in no respect responsible for the acts, omissions, derelictions or defaults of the foreign bank thereafter.

K., N. & K. submitted a list of foreign correspondents. It made no representations as to their financial responsibility; that was a matter the inland banks could investigate before using any of them if they chose. K., N. & K. agreed merely, as the *employee* and the *agent* of the inland bank, to provide the foreign bank with a fund equivalent to the one supplied to them by the inland bank. K., N. & K. represented that they had better facilities for doing this than the inland bank itself had—*and that is the only reason the inland bank used K., N. & K. rather than send the currency direct.* The limit of K., N. & K.'s obligation was to provide the fund to the bank abroad—thereupon their responsibility ceased. They were not responsible for any acts or omissions of the foreign bank after that. It must be clear to the Court that any other interpretation of K., N. & K.'s obligation would make K., N. & K. the guarantor of the financial responsibility of every one of the hundreds of scattered correspondents named in the list, as well as of their performance

of their agreement to meet the draft when presented. Considering the small fee which was paid for the service, it must be obvious that the inland bank did not expect and K., N. & K. never intended to assume such an obligation. Once the money was put into the hands of the foreign bank, K., N. & K. was "through"—so thoroughly through *that the foreign Bank never even advised what drafts had been paid and K., N. & K. were not interested to know* (fols. 160, 161, 433). The magnanimous offer by the Trustee to treat K., N. & K.'s obligations as one which continued until payment was accomplished cannot be considered seriously in view of the fact that K., N. & K. is in bankruptcy. The Court will not be slow to recognize that if K., N. & K. were *solvent* and the *foreign* bank had failed, K., N. & K. would be loud in their protestations against any such construction, and would forcefully and rightfully point to the terms of the Drawing Service, which shows that K., N. & K. were but *employees* and *agents* for a particular purpose; that the claimant's money had been sent to them as "Transfer Agents"; that they have performed the service for which they were employed, by putting into the hands of the foreign bank the fund which the inland bank gave them for that purpose and that thereupon they were discharged. Loudest of all would probably be the claim that it would be unreasonable to suggest that for the insignificant fee paid K., N. & K. for their services the inland bank expected or that K., N. & K. undertook to become guarantors of the financial responsibility of every one of the hundreds of scattered correspondents named in the list and of performance by these correspondents.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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